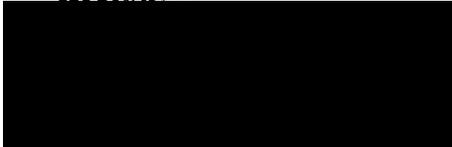


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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



File: EAC 02 007 54071 Office: VERMONT SERVICE CENTER

Date: OCT 16 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The case will be remanded for further consideration.

The petitioner is an internet-managed application service provider. It seeks to employ the beneficiary permanently in the United States as a senior Siebel consultant. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the counsel submits a statement.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any

office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on March 14, 2001. The proffered wage as stated on the Form ETA 750 is \$90,000 per year.

With the petition, counsel submitted the petitioner's 2000 annual report. The report states that the petitioner's Net cash used in operating activities was \$118,605,000. It further states that the petitioner had year-end current assets of \$110,881,000 and year-end current liabilities of \$108,375,000, which yields net current assets of \$2,506,000.

On January 2, 2002, the Vermont Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested that the petitioner provide a copy of the beneficiary's 2000 Form W-2 Wage and Tax Statement, if the petitioner employed the beneficiary during 2000.

In response, counsel submitted a letter from the petitioner's chief financial officer (CFO). That letter, dated March 25, 2002, stated that the petitioner employs 540 people and has the ability to pay the proffered wage. That letter also stated that the petitioner was then under bankruptcy reorganization. Counsel also submitted copies of the beneficiary's 2000 and 2001 W-2 forms and a letter from the beneficiary's doctor, dated August 15, 2000, stating that the beneficiary was unable to work from April 10, 2000 to September 1, 2000.

The 2000 and 2001 W-2 forms state that the petitioner paid the beneficiary \$16,746.20 and \$78,766.18 during those years, respectively.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on July 11, 2002, denied the petition. The director did not mention the assertion by the CFO that the petitioner employs 540 people and has the ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner has paid the proffered wage since before the priority date. Counsel further asserts that the petitioner has emerged from bankruptcy reorganization "stronger than ever."

The director erred in failing to consider the assertion by petitioner's CFO that the petitioner employs 540 people and has the ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2) states that under these circumstances,

(T)he director **may** accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. (Emphasis supplied.)

Although "may" implies discretion, the director is obliged to explain his reasoning if he elects not to accept the CFO's statement. In the case of a company which lost more than \$118 million during the last year for which records were provided, and which has recently emerged from bankruptcy protection, whether the director should accept the CFO's statement as dispositive is open to question.

The 2001 W-2 form does not support counsel's assertion that the petitioner has paid the beneficiary the proffered wage since the priority date. That W-2 form does, however, support that the petitioner has paid a considerable portion of that wage. This office notes that the petitioner is not obliged to demonstrate the ability to pay that portion of the proffered wage a second time, but only the ability to pay the difference between the proffered wage and what it paid to the beneficiary.

Although no financial statements for 2001 or 2002 were submitted, this office notes that the petitioner was under bankruptcy protection during some portion of those years. While under bankruptcy protection, a company is able to suspend payments on much of its debt. As a result, it accumulates cash quickly. That fast accumulation of cash is not necessarily an appropriate index of the company's past, present, or future performance. If such evidence is submitted, the director must be informed of the dates during which the petitioner was under bankruptcy protection, so that the figures may be appropriately scrutinized.

In determining the petitioner's ability to pay the proffered wage, the Service first examines the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both INS (now CIS) and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have

considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

In this case, no annual reports, federal tax returns, or audited financial statements pertinent to the years after the priority date have been submitted. On January 2, 2002, the date the request for evidence was issued, figures for 2001 were probably unavailable and the director appropriately did not request them. The director must determine whether requesting them on remand is desirable and appropriate.

This office notes that the decision below misstated the petitioner's 2000 year-end net current assets. The figures on the petitioner's audited financial statements, included in its annual reports, are stated in thousands of dollars. At the end of 2000 the petitioner had current assets of \$110,881,000 and current liabilities of \$108,375,000. Those amounts yield net current assets of \$2,506,000, not \$2,506.

Those net current assets are almost thirty times as large as the proffered wage. The amount the petitioner lost during that same year (Net cash used in operating activities), however, was almost 50 times as large as the petitioner's net current assets. If figures for ensuing years are made available and paint a similar picture, the director must consider whether the petitioner's net current assets in an amount greater than the proffered wage necessarily indicate the ability to pay the proffered wage.

ORDER: The petition is remanded for further consideration and action in accordance with the foregoing.